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David Sherwyn

Cornell University, dss18@cornell.edu

Paul Wagner

Stokes & Murphy

Gregg Gilman

Davis & Gilbert

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Trying to Make Sense of Sexual Harassment Law after *Oncale*, *Holman*, and *Rene*

Abstract

The state of the law governing sexual harassment, which was far from clear, was rendered more turbid by a 1998 U.S. Supreme Court holding that offered examples of specific situations under which such harassment might be actionable. The Court's ruling in a case of same-sex harassment has muddied the waters by opening the issue of the alleged harasser's motivation.

This provides a defense for harassers who may rebut the accusation that their actions are motivated by sexual interests. In addition to making same-sex harassment difficult to prove, this holding makes it nearly impossible for an individual to make a case of sexual harassment when that harassment is not specifically directed at that person even though the conduct at issue is severe or pervasive. Employers seeking to promote fair play and to prevent claims of sexual harassment must maintain strict no-harassment policies and educate their staffs on the reasons for such policies.

Keywords

sexual harassment, *Oncale*, *Holman*, *Rene*, no-harassment policies

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Trying to Make Sense of Sexual Harassment Law after *Oncale*, *Holman*, and *Rene*

by DAVID SHERWYN, PAUL WAGNER, and GREGG GILMAN

The state of the law governing sexual harassment, which was far from clear, was rendered more turbid by a 1998 U.S. Supreme Court holding that offered examples of specific situations under which such harassment might be actionable. The Court's ruling in a case of same-sex harassment has muddied the waters by opening the issue of the alleged harasser's motivation. This provides a defense for harassers who may rebut the accusation that their actions are motivated by sexual interests. In addition to making same-sex harassment difficult to prove, this holding makes it nearly impossible for an individual to make a case of sexual harassment when that harassment is not specifically directed at that person even though the conduct at issue is severe or pervasive. Employers seeking to promote fair play and to prevent claims of sexual harassment must maintain strict no-harassment policies and educate their staffs on the reasons for such policies.

Keywords: sexual harassment; *Oncale* *Homan*; *Rene*; no-harassment policies

Training to avoid sexual harassment is a common feature of many employers' employee-relations programs. In many cases, the trainers focus on the dos and don'ts of harassment but fail to educate the employees as to the state of the law. This is a problem because, in a vacuum, training is often frustrating. Managers and employees are put in embarrassing situations while the company explains what seem to be draconian policies that in an effort to make the workplace harassment free, create a culture of fear and distrust. Because law is unsettled and confusing, it is nearly impossible, without education, to create policies that managers and employees can understand and accept—as we explain in this article.

An example of the confusion surrounding the law concerns the answer to the following question: is it unlawful under federal law to sexually harass employees because of their sexual orientation? Under a plain reading of Title VII of the Civil Rights Act of 1964, its legislative history, and Supreme Court and lower court precedent, the answer is, clearly, no. At least one jurisdiction, however, has chosen to ignore existing law and forge a new path. In *Rene v. MGM Grand Hotel, LLC*, the U.S. Court of Appeals for the Ninth Circuit held that plaintiffs enjoy a cause of action for sexual harassment where the harassment is based solely on the alleged victim's sexual orientation.¹ The confusion of *Rene* forms the basis of this article.

During the Center for Hospitality Research's Labor and Employment Law Roundtable, the panelists discussed (among other topics) whether *Rene* could be either reconciled with the language of Title VII and existing precedent or explained as unabashed judicial activism.² The panelists' discussion provides the basis for this article, which after providing an overview of Title VII of the Civil Rights Act of 1964, tracks the evolution of sexual harassment law since 1998 and identifies the problems and inconsistencies within its evolution. At the end, we propose a management strategy for liability prevention in the face of the ever-changing and unpredictable law of sexual harassment.

The Civil Rights Act of 1964 Does Not Address Sexual Harassment

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, national origin, religion, and sex. It does not address what we have come to term as *sexual harassment*, which has

come to the fore in a series of judicial holdings. In its 1986 *Meritor Savings Bank v. Vinson* decision, the Supreme Court addressed the question of whether employers violated Title VII when a supervisor harassed an employee, but the employee did not suffer any tangible economic consequences.³ The Court held that sexual harassment did, in fact, violate Title VII, regardless of whether there was an economic loss, because the harassment, if severe enough, changed the conditions of employment. The *Meritor* Court explained that there were two types of sexual harassment: (1) quid pro quo and (2) hostile environment. Quid pro quo harassment is easily defined as requiring "sexual relations" in exchange for such things as continued employment or promotions. Hostile-environment sexual harassment is much more difficult to explain. For this purpose, the *Meritor* Court essentially adopted the definition of a hostile environment found in the Equal Employment Opportunity Commission's (EEOC) Guidelines. The Court described the EEOC Guidelines as follows: "In defining 'sexual harassment,' the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include '[unwelcome] sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.'"⁴ The Court did not, however, discuss motivation of the alleged harasser or the reasons supervisors might harass employees. In fact, the Court did not even provide a precise definition of sexual harassment. Instead, it simply provided examples of unlawful sexual harassment.

Lower Courts Created a Split in the Definition of Sexual Harassment

Because the *Meritor* Court did not define *sexual harassment*, the precise

meaning of that term was left open to interpretation by lower courts, which have disagreed on that definition. Shortly after *Meritor*, the Sixth, the Eleventh, and the Federal Circuits held that a plaintiff had to prove actual psychological damage to make out a case of hostile environment.⁵ Other jurisdictions, including the Ninth Circuit, expressly rejected this standard.⁶

In *Harris v. Forklift Systems, Inc.*, the Supreme Court resolved the split in the circuits' definitions by holding that a plaintiff need not prove psychological damage to prove sexual harassment.⁷ Instead, the Court held that a plaintiff need prove only that the conduct, from both an objective point of view (the so-called reasonable person) and a subjective perspective (that of the plaintiff himself or herself) was "so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin."⁸ Based on the plain language of Title VII and on Supreme Court precedent, both requiring disparate treatment on the basis of sex, the Court's holding could be understood as creating a two-part test to prove sexual harassment: (1) the *conduct* must be severe or pervasive and (2) the *motivation* for the harassment must be the plaintiff's sex. In reality, however, the conduct—not the motivation—was the only factor that the majority opinion, the concurring opinions, and the academic, legal, and lay commentaries focused on.

Justice Antonin Scalia's concurrence, for example, did not mention motivation and instead lamented the fact that the "severe or pervasive" standard "does not seem to me a very clear standard."⁹ Justice Scalia, however, admitted he could not clarify the ambiguity: "Be that as it may, I know of no alternative to the course the Court today has taken."¹⁰ Justice Judith

Ginsburg's concurrence began with a statement that could be construed as focusing on the motivation of the harasser when she stated, "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."¹¹ The logical extension of this statement is that in the absence of evidence that the harasser treated the plaintiff differently than the members of the other sex, the harasser's subjective motivation for the harassment naturally comes into play. Justice Ginsburg did not, however, continue with this point. In fact, the remainder of Justice Ginsburg's concurrence ignored motivation and focused exclusively on conduct. Ginsburg stated, "The adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference . . . it suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job."¹²

Courts Presumed the Motivation in Opposite-sex Harassment Was Sexual Gratification

Notwithstanding the probative value of the harasser's motivation, Justices Scalia's and Ginsburg's emphasis on conduct was understandable in *Harris* for two reasons. First, the facts of the case centered on conduct. Second, throughout the history of sexual harassment law, the motivation of the harasser was typically a matter of presumption. In the vast majority of cases, the plaintiff was harassed by a member of the opposite sex and the conduct was "sexual in nature." Indeed, the conduct was so

often sexual in nature that the term became part of the definition of sexual harassment in many jurisdictions.¹³ Defining sexual harassment as being sexual in nature seemingly took motivation off the table by presuming the harasser's motivation: if the plaintiff and harasser were of the opposite sex and conduct was sexual, courts presumed that the motivation was due to the sex of the plaintiff. Defendants rarely, if ever, contested this presumption. Thus, in traditional opposite-sex harassment cases, where the conduct was sexual, motivation was never at issue. Instead, the only issues for the fact finder to decide were (1) did the conduct occur and (2) was it severe or pervasive. Over time, however, a number of cases that did not fit into this traditional model began to appear before the courts.

Courts Created Gender Harassment

In *Cline v. General Electric Capital Auto Lease, Inc.*, plaintiff Cline alleged that her supervisor sexually harassed her by, for example, calling her pet names and keeping track of the amount of time she spent in the bathroom.¹⁴ The court explained that the plaintiff did not have a case of sexual harassment, because the conduct alleged was not sexual in nature. In some jurisdictions, such a finding would have ended the case right there. The *Cline* Court, however, found a different cause of action under Title VII, namely, "gender harassment." Gender harassment, the *Cline* Court held, occurred when the plaintiff proved that (1) she was harassed, (2) the conduct was severe or pervasive, (3) the conduct was not sexual in nature, and (4) the plaintiff's gender motivated the harasser.¹⁵ This holding set up a three-way jurisdictional split among those courts that required sexual harassment

plaintiffs to allege conduct that was sexual in nature, those courts that did not so require, and those that recognized gender harassment as a legitimate cause of action.

At the same time, sexual harassment law became further muddled by a different type of case that began to appear in the courts: same-sex sexual harassment. Predictably, the courts split on how to address this new development.

Same-sex Sexual Harassment Created a Logical and Legal Mess

The first generation of same-sex sexual harassment claims resulted in four substantively different holdings. First, in *Garcia v. Elf Atochem North America*, the Fifth Circuit held that a plaintiff could not make out a case of same-sex harassment under Title VII.¹⁶ Then, in *Wrightson v. Pizza Hut of Am.* and *McWilliams v. Fairfax County Bd. of Supervisors*, the Fourth Circuit held that a plaintiff could state a claim for same-sex harassment but only if the harasser was homosexual.¹⁷ Next, the Eighth Circuit, in *Quick v. Donaldson*, held that a plaintiff could make out a same-sex harassment case only if one gender—and not the other—was exposed to the conduct in question, thereby absolving the "equal-opportunity" sexual harasser from liability. Finally, in *Doe v. Belleville*, the Seventh Circuit held that a plaintiff could state a claim for same-sex sexual harassment where the harassment was due to the plaintiff's failure to live up to sexual stereotype.¹⁸ Because of its overbroad language and the fact that it did not discuss sexual stereotyping until near the end of fifty-page opinion, some courts interpreted *Doe* as holding that any severe or pervasive conduct of a sexual nature was per se unlawful.¹⁹ Despite the implication, the *Doe* Court did not hold that sex-

ual conduct was per se unlawful but that conduct motivated by sexual stereotyping was unlawful.

Motivationally speaking. The Seventh and Eighth Circuit holdings were intriguing because they focused on the motivation of the harasser, which cannot be gauged by conduct alone. Under both holdings, the plaintiffs had to prove not only that they were harassed but also the reason for the harassment. Conversely, the Fourth Circuit's holding was similar to traditional sexual harassment law. The court considered sexual preference as a threshold question and then held that a plaintiff who belonged to the gender that the harasser "preferred" could prove sexual harassment with conduct alone. We see the Fifth Circuit's holding as being simply absurd. Say that a male manager terminated the employment of a female subordinate for refusing the manager's demands for sexual relations. Hypothetically, that manager would be guilty of sexual harassment, and the company would be liable for back pay, reinstatement, plaintiffs' attorneys' fees, and up to \$300,000 in punitive damages. However, under the Fifth Circuit's holding, if that hypothetical employee is male, he has no redress and must either acquiesce to the supervisor's sexual demands or lose his job. This holding makes no sense.

The Supreme Court first addressed the question of same-sex sexual harassment in *Oncale v. Sundowner Offshore Services*, in which the Court found that motivation was the key issue in sexual harassment cases.²⁰ Specifically, the Court held that plaintiffs could state a claim for sexual harassment if, and only if, they were harassed "because of sex." *Oncale* arose in the Fifth Circuit, where courts had previously held that a plaintiff could never

make out a claim for same-sex sexual harassment. The Supreme Court expressly rejected the Fifth Circuit's holding and also rejected the Fourth Circuit's holding that a same-sex sexual harassment claim depended on the sexual orientation or preference of the harasser. The Court did not specifically address the Seventh Circuit's holding in *Doe v. City of Belleville*, that a plaintiff could make out a case if he were harassed because of a failure to live up to sexual stereotype, but did reject the Seventh Circuit's "suggest[ion] that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations."²¹ Finally, although not explicitly adopting the Eighth Circuit's holding in *Quick v. Donaldson*, the Supreme Court seemed to endorse the logic of that decision in finding that a plaintiff could sustain a claim for same-sex sexual harassment with proof that the plaintiff's gender motivated the harasser, with the following language: "the plaintiff . . . must always prove that the conduct at issue . . . actually constituted 'discrimination . . . because of . . . sex.'"²²

To illustrate its holding, the *Oncale* Court provided three different examples of actionable same-sex sexual harassment where the harasser was motivated by the plaintiff's sex. First, the Court held that a plaintiff could sustain a same-sex sexual harassment claim if "there were credible evidence that the harasser was homosexual."²³ Next, the Court stated that "a trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."²⁴ Finally, the Court held that a plaintiff could make out a case by

comparing his or her treatment to that of the opposite sex, stating that “a same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”²⁵

At first glance, these three examples seem both logical and unproblematic. Accordingly, proemployee commentators and gay-rights advocates immediately hailed the decision as being great advancement for all employees—both gay and heterosexual. Indeed, it is difficult to find fault with the first two examples. Homosexuals who harass employees of the same gender are likely to be motivated by the employees’ gender. Similarly, a supervisor who uses sex-specific terms in harassing an employee is also probably motivated by sex. The third example, however, created problems for courts and plaintiffs alike. In a 1998 article, we predicted these problems by taking this holding to its logical extension and contending that if plaintiffs could prove sexual harassment by showing that opposite sex employees did not suffer the same treatment, then employers could defend harassment cases by proving that members of both sexes were subject to the same treatment.²⁶ Such a showing by an employer, we contended, would act as complete defense to either a same-sex or opposite-sex harassment claim. Based on our analysis at the time, we concluded that the *Oncale* Court had codified a defense to sexual harassment that had been bandied about for years, that is, the equal-opportunity harasser.²⁷

The Equal-Opportunity-Harasser Defense Is a Natural Outgrowth of *Oncale*

In the years following *Oncale*, our prediction came to pass. A 2001 *Cornell*

Quarterly article traced the development of the equal-opportunity-harasser defense. In that article, we discussed *Holman v. Indiana*, a case where a husband and wife alleged that their supervisor requested oral sex from each of them.²⁸ They refused and sued. The U.S. Court of Appeal for the Seventh Circuit, citing *Oncale*, dismissed the case on the grounds that the harasser harassed members of both sexes and therefore was not motivated because of sex.²⁹ Other courts, however, refused to accept this defense and either (1) expressly rejected it³⁰ or (2) found another reason to justify a finding of harassment despite the fact that both men and women suffered the treatment at issue.³¹

To some, the equal-opportunity-harasser defense is an anomaly that will have little real effect because facts giving rise to its use will rarely occur. We contend, however, that the defense will have profound consequences on traditional opposite-sex sexual harassment cases because alleged harassers can now testify that any number of non-sex-related subjective motivations compelled their conduct. As stated above, in opposite-sex sexual harassment cases, courts presumed that sexual conduct directed at a specific plaintiff was because of sex. After *Oncale*, the presumption remains, but it now may be rebutted. Providing alleged harassers with the subjective factual defense of “I was not motivated by sex,” an argument that cannot be easily overcome by plaintiffs, changes the face of sexual harassment law. The plaintiff must rebut this testimony and prove that the plaintiff’s sex motivated the harasser. This will be difficult in many cases and impossible in a number of situations because of the subjective nature of this kind of evidence. In addition, we believe that the logic behind the equal-opportunity-harassment

defense will virtually eliminate cases where the plaintiff is not the intended victim of the harassment.

The Viability of Sexual Harassment Cases Not Directed at a Specific Person Is in Question

To expand on that last point, sexual harassment claims where the plaintiff is

Holdings in sexual harassment cases have made matters murkier, even as employers seek clarity.

not an intended victim of the harassment, but is merely an observer to “sexual conduct,” appear to be dead. Before *Oncale*, there were a number of cases where women successfully brought sexual harassment cases based on the display of pornography in the workplace or sexually charged comments and banter among men or by men but within the earshot of both men and women. The viability of these cases is now in serious question because the conduct bears no relationship to the plaintiff’s sex. Thus, it would be difficult, if not impossible, for a woman to support a complaint that she has been harassed “because of her sex” based on evidence of (1) pictures of naked women that either predated the plaintiff’s employment or were not directed at the plaintiff, (2) sexually explicit conversations between men that happened to be in the same vicinity as the plaintiff, or (3) a tirade by a male supervisor that is directed at both men and women and is filled with sexually explicit terms. These claims no longer make sense under the because-of-sex requirement of *Oncale*.³²

The Unsettled Nature of the Law Is a Problem for Employers and Employees Alike

At this point, an employer reading this article might think that post-*Oncale* sexual harassment developments seem like good news. *Oncale* purported to open the door to a whole new set of claims when, in fact, it made it more difficult for certain sexual harassment claims to succeed by creating a number of new defenses. While it is true that employers may have additional defenses after *Oncale*, this new standard may ultimately prove to be a negative development for employers. First, the fact that supervisors may lawfully harass men and women, as long as they do so evenhandedly, or that employees may display pornography in the worksite without legal consequence is inconsistent with the fundamental logic of both sexual harassment law and good management practices. These seemingly illogical results created by the *Oncale* Court’s emphasis on motivation as the sine qua non of sexual harassment liability further muddies an already confusing legal rubric for employers. Moreover, the illogical and arguably unjust results in certain factual settings under the *Oncale* standard will cause some courts to contort the law to avoid such results, thus further confusing employers who are in good faith seeking a practical standard for liability prevention.

Employers are best off when the law is reasonable and clear. When that is the case, employers can create policies and practices that are straightforward, intuitive to most rational employees, and effective at avoiding legal liability in most situations. When the law is an ever-changing swirl of prohibitions and exceptions, employers often feel compelled to

1964: Congress passes and President Johnson signs the Civil Rights Act of 1964

Action: Title VII of the Civil Rights Act prohibits employment discrimination based on race, color, national origin, religion, and sex.

1986: *Meritor Saving Bank v. Vinson* (Supreme Court)

Action: Supreme Court addressed the question of whether employers violated Title VII when a supervisor harassed an employee, but the employee did not suffer any tangible economic consequences. The Court held that “sexual harassment” did, in fact, violate Title VII, regardless of whether there was an economic loss because the harassment, if bad enough, changed the conditions of employment. The Court also defined sexual harassment as coming in one of two forms: (1) quid pro quo and (2) hostile environment.

Unresolved Issue: The court did not expressly (1) define *hostile environment*, (2) state when employers are liable for the actions of their supervisors, and (3) set forth the relevance of motivation of the alleged harasser or the reasons supervisors might harass employees.

1991: *Cline v. General Electric Capital Auto Lease, Inc.* (2nd district)

Action: Created “gender harassment” as a cause of action under Title VII.

Unresolved Issue: Decision set up a three-way jurisdictional split between those courts that required sexual harassment plaintiffs to allege conduct that was sexual in nature, those that did not, and those that recognized gender harassment as a legitimate cause of action.

1993: *Harris v. Forklift Systems Inc.* (Supreme Court)

Action: Supreme Court held that a plaintiff need not prove psychological damage to prove sexual harassment. Instead, the Court held that a plaintiff need only prove that the conduct, from both an objective (the so-called reasonable person) and a subjective (the plaintiff himself/herself) perspective was “so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin.”

Unresolved Issue: What does severe or pervasive really mean? Does the harasser’s motivation matter or does sexual conduct create a presumption that the motivation was the employee’s gender?

1994–1998: Same-sex sexual harassment creates a split among the circuit courts.

1994: *Garcia v. Elf Atochem North America* (Fifth Circuit)

Action: Fifth Circuit held that a plaintiff could not make out a case of same-sex harassment under Title VII.

1996: *Wrightson v. Pizza Hut of Am., McWilliams v. Fairfax County Bd. Of Supervisors*

Action: Fourth Circuit held that a plaintiff could state a claim for same-sex harassment but only if the harasser was homosexual.

1996: *Quick v. Donaldson*

Action: Eighth Circuit held that a plaintiff could make out a same-sex harassment case only if one gender—and not the other—was exposed to the conduct in question, thereby absolving the “equal-opportunity” sexual harasser from liability.

1997–1998: *Doe v. City of Belleville*

Action: Seventh Circuit held that a plaintiff could state a claim for same-sex sexual harassment where the harassment was due to the plaintiff’s failure to live up to sexual stereotype. Opinion suggests that severe or pervasive conduct of the sexual nature is per se unlawful.

1998: *Oncale v. Sundowner Offshore Services*

Action: Supreme Court first addresses the question of same-sex sexual harassment. The Supreme Court explicitly rejects (1) the Fourth Circuit’s holding that a same-sex sexual harassment claim depended on the sexual orientation or preference of the harasser; (2) the Fifth Circuit’s holding that plaintiff could never make out a claim for same-sex sexual harassment; and (3) the Seventh Circuit’s suggestion that workplace harassment that is sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation, or motivations. The Court rules that harassment must be “because of sex.” Seemed to endorse the logic of the Eighth Circuit that a plaintiff could sustain a claim for same-sex sexual harassment with proof that the plaintiff’s gender motivated the harasser. Seemed to eliminate viability of sexual harassment cases not directed at a specific person.

Issues: Taking this holding to its logical extension, one can infer that if (1) plaintiffs could prove sexual harassment by showing that opposite sex employees did not suffer the same treatment, then (2) employers could defend harassment cases by proving that members of both sexes were subject to the same treatment (i.e., the equal-opportunity harasser).

2000–2003: More splits between circuit courts materialize.

2000: *Holman v. Indiana*

Action: Seventh Circuit upholds the equal-opportunity-harasser defense.

2001: *Brown v. Henderson*

Action: Second Circuit expressly rejects equal-opportunity-harasser defense.

2003: *Rene v. MGM Grand Hotel*

Action: Ninth Circuit found another reason to justify a finding of harassment. Holds that plaintiffs can prove sexual harassment by showing that conduct was sexual and not all employees (men and/or women) were subjected to such conduct.

Unresolved Issue: Different standards across circuits prevents well-meaning employers from being able to implement policies that ensure compliance with the law.

create overreaching policies to cover all contingencies. Such policies are difficult to implement and enforce, cost the employer too much money, and may damage employee morale. However, based on decisions like *Rene v. MGM Grand Hotel, Inc.*, employers may have no choice but to insist on strict policies.³³

Rene Epitomizes the Problems with the Law

In *Rene*, the plaintiff, a butler at the MGM Grand, alleged that he had been sexually harassed. According to the plaintiff, the harassers' conduct included whistling and blowing kisses at Rene, calling him "sweetheart" and "muneca" (Spanish for "doll"), telling crude jokes and giving sexually oriented "joke" gifts, and forcing Rene to look at pictures of naked men having sex.³⁴ Moreover, on "more times than [Rene said he] could possibly count," the harassment involved offensive physical conduct of a sexual nature.³⁵ Rene gave deposition testimony that he was caressed and hugged and that his coworkers would "touch [his] body like they would to a woman."³⁶ On numerous occasions, he said, they grabbed him in the crotch and poked their fingers in his anus through his clothing. When asked why the harassers directed such conduct at him, the plaintiff stated that it was because he was gay.³⁷

Rene presented a case where the employee suffered from harassment that was sexual in nature and both severe and pervasive. As such, the conduct more than satisfied the criteria set out in *Harris Forklift*. Under the *Oncale* standard, however, the appellate court should have dismissed the cases after hearing the plaintiff's admission that Rene's sexual orientation, not his gender, motivated the harassers. This is the case because sexual orientation

is not a protected class under federal law and, thus, harassment because of sexual orientation is not illegal. The U.S. Court of Appeals for the Ninth Circuit, however, failed to apply the *Oncale* because-of-sex standard and did not dismiss the case. Instead, we believe that the court misapplied the law to achieve a positive result for the plaintiff.

The *Rene* Court acknowledged that the lower (trial) court had dismissed the case because of the plaintiff's testimony that he had been harassed because he was gay. In reversing this holding, the *Rene* Court, without citing any precedent, rejected the holding. In fact, in response to the lower court's holding that harassment based on orientation is not unlawful, the Ninth Circuit stated, "This is not the law. We have surveyed the many cases finding a violation of Title VII based on the offensive touching of the genitalia, buttocks, or breasts of women. In none of those cases has a court denied relief because the victim was, or might have been, a lesbian. The sexual orientation of the victim was simply irrelevant. If sexual orientation is irrelevant for a female victim, we see no reason why it is not also irrelevant for a male victim."³⁸

Although this comment may make sense on its face, the court's holding plainly ignores the fact that Congress has expressly rejected an amendment to Title VII that would protect sexual orientation.³⁹ The statement also ignores the law as set forth in *Oncale*. Undoubtedly, the cases referenced but not cited by the court dealt with traditional male-on-female sexual harassment. Because the conduct was sexual in nature, the courts presumed that the harasser's motivation was because of sex. Such a scenario is easily distinguishable from *Rene* because, after *Oncale*, the presumption that sexual con-

duct is because of sex is either not available or, at best, is rebuttable. Here, the plaintiff himself rebutted the presumption. He testified that the conduct was motivated by his own sexual orientation not his gender.

To underscore what we see as the Ninth Circuit's mistake in *Rene*, the court actually cites *Oncale* as supporting its holding. The court correctly states that in *Oncale*, the Supreme Court found a cause of action for same-sex sexual harassment when the harasser engages in severe or pervasive sexual touching. Furthermore, the court acknowledges that *Oncale* requires a plaintiff to prove disparate treatment. However, the Ninth Circuit then develops a completely novel test for disparate treatment when it allows *Rene* to sustain his claim upon proof that he was treated differently than other men. Thus, under *Rene*, a plaintiff establishes sexual harassment by proving that (1) the conduct was sexual, (2) the conduct was severe or pervasive, and (3) other employees, whether men or women, were not harassed.⁴⁰ Stated another way, *Rene* allows a plaintiff to recover for harassment that is sexual in content, as long as all other employees were not subjected to such conduct. The harasser's sex, sexual orientation, and motivation are irrelevant. This holding is almost identical to the *Johnson v. Hondo* Court's interpretation of the Seventh Circuit's decision *Doe v. City of Belleville*. Once again, in *Oncale*, the Supreme Court expressly rejected this interpretation.⁴¹

The Ninth Circuit also justifies its finding of disparate treatment on the ground that *Rene* was singled out for harassment. However, the plaintiff in *Oncale* suffered the same fate, and the Supreme Court remanded that case to determine whether "the conduct at issue was not merely

tinged with offensive sexual connotations, but actually constituted 'discrimination . . . because of . . . sex.'"⁴² Accordingly, *Oncale* makes clear that the mere singling out of a plaintiff for harassment cannot answer the question of whether that plaintiff has suffered disparate treatment.

Sexual Stereotyping Is Another Method for Creating a Cause of Action

As if the Ninth Circuit's majority opinion was not enough to muddy the sexual harassment waters, the concurring opinion proposes yet another basis for *Rene* to prove disparate impact on these facts. The concurrence suggests that *Rene* could prove disparate treatment by showing that the plaintiff's failure to live up to a sexual stereotype motivated the discriminator. This theory formed the basis of the Supreme Court's 1988 *Price-Waterhouse v. Hopkins* decision.⁴³ In *Hopkins*, the plaintiff alleged that the firm discriminated against her because she was "considered too aggressive and not feminine enough for a woman." The Court held that employers violate Title VII when they subject employees to discrimination or harassment because the employee failed to live up to a sexual stereotype.

The Ninth Circuit's concurrence in *Rene* relies on *Hopkins* and a subsequent line of cases and contends that employers violate the law when supervisors harass gay men who do not live up to a male sexual stereotype. There are, however, some obvious fundamental problems with this argument. First, *Rene* never pleaded that he was harassed because of his failure to live up to a sexual stereotype. Moreover, the argument raises a number of questions. First, are all homosexuals protected by the

law because, by definition, they fail to live up to sexual stereotypes, or is this protection reserved only for effeminate men and masculine women? Second, is it appropriate for the courts to make homosexuality a protected class when Congress has expressly rejected this addition to the law? Third, should the law create a situation where an individual, like Joseph Oncale, a man who was sodomized and abused, would win his case if he were effeminate or gay but lose if he were neither effeminate nor homosexual? In other words, should it be lawful to sodomize Oncale if he is heterosexual and masculine in behavior and appearance?

We contend that regardless of the answer to question one, the answer to questions two and three is a resounding no. Trying to combat blatant sexual conduct by relying on sexual stereotyping creates as many problems as the shortsighted holding of *Oncale*. As we stated in 1998, there is a relatively easy way to fix the problems with sexual harassment law.⁴⁴ We suggest that Congress create a statute stating the following: conduct of the sexual nature should be per se unlawful if it is severe or pervasive. Under this rule, all employees—gay or heterosexual—would be free from overt sexual conduct that has no legitimate purpose in the workplace. Unfortunately, our proposed standard is not the law. Thus, employers are left to follow a moving target as courts like the Ninth Circuit make new law. This fact raises the following question: what should employers do?

What Employers Should Do

Our answer to the what-to-do question is, to begin with, employers must understand the law. Next, they must teach the law to their managers. Last, employers should teach the law to their employees.

Once everyone in the organization understands the inconsistencies and general absurdities of the law, it is possible to establish policies and practices that can rid the workplace of objectionable conduct and minimize legal liability. As stated above, too often sexual harassment training consists of dos and don'ts without explanations. Managers and employees often resent sexual harassment policies because they do not understand the theory behind those policies. We contend that a well-conceived communication and training process can alleviate the angst created by sexual harassment policies. With such an approach, the company can explain (1) how misunderstandings can result in sexual harassment claims and (2) that such claims can destroy the lives of employees and jeopardize the company. This is why we strongly recommend that all training to prevent sexual harassment include a discussion of the law. That way, managers and employees can understand the minefield that employers are attempting to navigate.

Of course, education is not enough; employers need concrete policies. Some employers ban all sexual conduct with so-called zero-tolerance policies. These policies are controversial because they are hard to enforce. People spend a lot of time at work and, depending on the environment of the workplace, may at times engage in sexual banter. The hospitality industry is notorious for being a place where such banter is prevalent. Managers working with such policies are put in a difficult situation. Should they "violate" the policy by letting some banter occur, or should they strictly enforce the policy and create morale problems? Neither approach is satisfactory. On the other hand, employers who do not have such policies are susceptible to claims that they

did not exercise reasonable care to prevent and correct harassment because they effectively allowed a line supervisor to determine the law.

While there is no right answer, we agree with those who advise employers to enact zero-tolerance policies. This must be the company's policy because it is the best defense against a claim of harassment. We hope, however, that the communication program mentioned above will make such a policy more palatable by explaining to the employees the reasons behind the concept.

In dealing with reported complaints, we suggest, however, that our standard be the guiding principle for employers. Employers who eliminate sexual conduct that is severe or pervasive, regardless of the harasser's motives, will not have to rely on the equal-opportunity-harasser defense or be concerned that a court may follow *Rene*. Instead, they will have complied with the law and, in some cases, exceeded what the law requires. Moreover, they will have provided a workplace that is free from the type of conduct that serves no legitimate purpose.

Applying this standard is also appropriate when meting out discipline. If the conduct alleged is sexual and severe or pervasive, the discipline should be extreme. If it is not sexual or not severe or pervasive, the discipline should be moderate. This is the case even if the company has a zero-tolerance policy. Companies do not want to lose good employees or create morale problems by discharging an employee who violates a zero-tolerance policy but does not come close to violating the law. On the other hand, employers do not want merely to slap the wrist of an employee or manager whose conduct could lead to finding of harassment against the company. Basing discipline on our proposed standard will ensure that employers avoid

such problems. Employers should not, however, make close calls. If you think a situation may be severe or pervasive, treat it as though it is.

Endnotes

1. *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206 (9th Cir. Nev. 2001), cert denied, 155 L. Ed. 2d 313, 123 S. Ct. 1573 (U.S. 2003).
2. This roundtable was conducted in May 2003.
3. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399 (1986).
4. *Id.* at 65, 106 S. Ct. 2402.
5. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (CA6 1986); *Vance v. Southern Bell Telephone & Telegraph Co.*, 863 F.2d 1503, 1510 (CA11 1989); and *Downes v. FAA*, 775 F.2d 288, 292 (CA Fed. 1985).
6. *Ellison v. Brady*, 924 F.2d 872, 877-878 (CA9 1991).
7. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 370 (1993).
8. *Id.* at 22, 114 S. Ct. at 371.
9. *Id.* at 24, 114 S. Ct. at 372.
10. *Id.*
11. *Id.* at 25, 114 S. Ct. at 372.
12. *Id.*
13. See: *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213, 214 (7th Cir. 1986).
14. *Cline v. General Electric Capital Auto Lease, Inc.*, 757 F. Supp. 923, 931 (N.D. Ill. 1991). The "pet names" were far from innocuous. For example, the supervisor referred to Phyllis Cline as "Syphilis, the gift that keeps on giving."
15. *Id.* at 931.
16. 28 F.3d 446 (5th Cir. 1994).
17. *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996); and *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1199 (4th Cir. 1996), cert denied, 519 U.S. 819, 117 S. Ct. 72 (1996).
18. *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), vacated by, 523 U.S. 1001, 118 S. Ct. 1183 (1998).
19. *Johnson v. Hondo, Inc.*, 125 F.3d 40 (7th Cir. 1997).
20. *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 118 S. Ct. 998 (1998).
21. *Id.*

22. *Id.* at 80, 118 S. Ct. at 1002.
23. *Id.*
24. *Id.*
25. *Id.* at 81, 118 S. Ct. at 1002.
26. David Sherwyn and J. Bruce Tracey, "Sexual-harassment Liability in 1998—Good News or Bad News for Employers and Employees?," *Cornell Hotel and Restaurant Administration Quarterly*, vol. 39, no. 5 (October 1998), pp. 14–21.
27. The equal-opportunity-harasser defense does predate *Oncale*. See *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982); and *Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996).
28. *Holman v. Indiana*, 24 F. Supp. 2d 909 (N.D. Ind. 1998), cert denied, 531 U.S. 880, 121 S. Ct. 191 (2000).
29. *Id.* at 916.
30. See: *Brown v. Henderson, Postmaster General of the United States Postal Service*, 257 F.3d 246 (2nd Cir. 2001); however, in the absence of evidence suggesting that a plaintiff's sex was relevant, the fact that both male and female employees are treated similarly, if badly, does give rise to the inference that their mistreatment shared a common cause that was unrelated to their sex.
31. See: *Rene*, 243 F.3d, at 1206.
32. For an excellent discussion of this topic, see: Kelly Cahill Timmons, "Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?," 81 Neb. L. Rev. 1152 (2003).
33. See: *Rene*, 243 F.3d.
34. *Id.* at 1207.
35. *Id.* at 1208.
36. *Id.* at 1211.
37. *Id.* at 1207.
38. *Id.*
39. Neither Title VII, the Age Discrimination in Employment Act of 1967, nor the Americans with Disabilities Act of 1990 prohibits general harassment. Thus, to violate discrimination law, harassment must be based on one of the seven characteristics protected by statute. Accordingly, if orientation is not protected, then harassment based on orientation does not violate federal law. Similarly, harassment based on a person's favorite basketball team or the person's favorite author is not protected either.
40. Such a holding raises the questions of what happens if (1) all men were treated this way, (2) more than one man was treated this way, or (3) all employees were treated this way.
41. *Doe v. City of Belleville*, *supra*.
42. *Oncale* at 81, 118 S. Ct. at 1002.
43. *Price-Waterhouse v. Hopkins*, 485 U.S. 933, 108 S. Ct. 1106 (1988).
44. Sherwyn and Tracey, pp. 14–21.



David Sherwyn, J.D., is an associate professor of law at the Cornell Hotel School (dss18@cornell.edu), where **Paul Wagner**, J.D., a partner at the law firm of Stokes & Murphy, is an adjunct professor of law. **Gregg Gilman**, J.D., is a partner at the New York City law firm of Davis & Gilbert. The authors participated in the May 2003 roundtable on which this article is based.